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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

NO. 74-6521

MONICA ALDINGER,

Petitioner,

v.

MERTON HOWARD, individually and in his capacity as Treasurer of Spokane County,

Defendant,

and SPOKANE COUNTY, a public corporation,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE RESPONDENT

DONALD C. BROCKETT
Spokane County Prosecuting Attorney

GARALD A. GESINGER
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County-City Public Safety Building
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STATEMENT OF THE CASE

The petitioner was terminated from her position in the Spokane County Treasurer's Office in 1971, as she alleges. However, it was not until the Second Amended Complaint was filed some two years later that any assertion or question of pendent jurisdiction was made by petitioner (App. 3, 13).

The sole reference to pendent jurisdiction made by petitioner in her second amended complaint was the conclusory statement that: "Further, the Federal District Court may exercise Pendant [sic] Jurisdiction over the state law claims against the parties as more fully set forth herein."

No state claim whatsoever against the respondent County was stated upon which any relief could be granted. In the paragraph entitled PARTIES, petitioner merely stated that Defendant, Howard, was acting as an agent of Spokane County (App. 13) and "Defendant Spokane County is a public corporation and an action may be maintained against it authorized by RCW 4.08.120." (App. 14)

SUMMARY OF ARGUMENT

The Constitution of the United States empowers the federal judiciary under Article III, Section 2, with the ability to hear and determine certain cases. The ability to hear and determine these cases has been extended by the federal courts by virtue of the doctrine of pendent jurisdiction in which the courts have taken unto

themselves both state claims and additional parties because of their determination that under basic reasons of fairness they would be unable otherwise to determine the "whole case."

Respondent contends in this proceeding that such a creation and extension of pendent jurisdiction is, in fact, unconstitutional and should be abandoned by this court. The reasons for the abandonment of the doctrine are the same as those mentioned by the courts in a discussion of this doctrine and a determination that the doctrine should be merely discretionary.

The forefathers of this country did not envision that the federal judiciary would, by a doctrine known as pendent jurisdiction, usurp the power of the state judiciaries to determine their own state claims with a review later, if necessary, by the federal judiciary. Such an extension by the courts of this country has been largely to "do equity" to the parties without a realization that such is, in fact, in contravention of constitutional principles.

In this Civil Rights action, it is especially important for the Court to view the ramifications of the extension of the doctrine of pendent jurisdiction and determine at this time in the history of our country that we shall return to the power of the judiciary as envisioned by our forefathers and thus abandon pendent jurisdiction.

ARGUMENT

I

THE CONSTITUTION OF THE UNITED STATES CLEARLY INDICATES THAT

THERE IS A CONSTITUTIONAL BAR TO THE DOCTRINE OF PENDENT JURISDICTION ALLOWING THE FEDERAL COURTS TO DETERMINE STATE CLAIMS.

As clearly admitted by the petitioner, the jurisdiction of the federal courts was created and limited by the United States Constitution in Article III, Section 2. That provision of the Constitution provides, inter alia:

> "JURISDICTION. The judicial power shall extend to all cases in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states; between a state and citizens of another state; between citizens of different states, between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof and foreign states, citizens or subjects . . ."

It cannot be denied that the judicial power of the federal courts is limited, as are all other powers within the Constitution of the United States, by Amendment X which provides:

> "POWERS RESERVED TO STATES OR PEOPLE. The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

The doctrine of pendent jurisdiction has been artificially created by the courts as a result of their attempt to enlarge the clause "cases and controversies" contained within Article III, Section 2, of the United States Constitution. The question clearly presented in this case is whether or not the doctrine of pendent jurisdiction should be extended as it has been by various circuit courts within the federal system and adopted by this Court as a constitutional doctrine entitled to recognition henceforth.

The respondent contends herein that our forefathers did not intend that the jurisdiction of the federal courts would be other than as specifically set out in the United States Constitution. In a number of references to the United States Constitution, Alexander Hamilton, in presenting an argument to the people of the State of New York as to why the United States Constitution should be adopted, carefully explained the severe limitations upon federal authority by virtue of the explicit statements contained within that constitutional document.

The first such reference clearly appears in the Federalist Paper No. 32, wherein Hamilton states:

> "But as the plan of the Convention aims only at a partial Union

or consolidation, the State Governments would clearly retain all the rights of sovereignty which they before had and which were not by that act exclusively delegated to the United States. This exclusive delegation or rather this alienation of State sovereignty would only exist in three cases; where the Constitution in express terms granted an exclusive authority to the Union; where it granted in one instance an authority to the Union and in another prohibited the States from exercising the like authority; and where it granted an authority to the Union, to which a similar authority in the States would be absolutely and totally contradictory and repugnant. I use these terms to distinguish this last case from another which might appear to resemble it; but which would in fact be essentially different; I mean where the exercise of a concurrent jurisdiction might be productive of occasional interferences in the policy of any branch of administration, but would not imply any direct contradiction or repugnancy, in point of constitutional authority" (p. 200).

The Federalist, edited by J. E. Cooke, Wesleyan University Press (1961) Library of Congress Catalog Card Number: 61-6971.

Hamilton clearly recognized the difficulty that might occur as a result of concurrent

jurisdiction when he said in Federalist Paper No. 33:

> "The necessity of a concurrent jurisdiction in certain cases results from the division of the sovereign power; and the rule that all authorities of which the States are not explicitly divested in favour of the Union remain with them in full vigour, is not only a theoretical consequence of that division but clearly admitted by the whole tenor of the instrument which contains the articles of the proposed constitution. We there find that notwithstanding affirmative grants of general authorities, there has been the most pointed care in those cases where it was deemed improper that the like authorities should reside in the States, to insert negative clauses prohibiting the exercise of them by the States" (Id., p. 203).

With reference to the question of the supremacy of the law of the United States, Hamilton stated:

> "But it is said, that the laws of the Union are to be the Supreme Law of the land. But what inference can be drawn from this or what would they amount to, if they were not to be supreme? It is evident they would amount to nothing. A Law by the very meaning of the term includes supremacy. It is a rule which those to whom it is prescribed are

bound to observe. This results from every policital association. If individuals enter into a state of society the laws of that society must be the supreme regulator of their conduct. If a number of political societies enter into a larger political society, the laws which the latter may enact, pursuant to the powers entrusted to it by its constitution, must necessarily be supreme over those societies, and the individuals of whom they are composed. It would otherwise be a mere treaty, dependent on the good faith of the parties, and not a government; which is only another word for POLITICAL POWER AND SUPREMACY. But it will not follow from this doctrine that acts of the larger society which are 'not pursuant' to its constitutional powers but which are invasions of the residuary authorities of the smaller societies will become the supreme law of the land. These will be merely acts of usurpation and will deserve to be treated as such. Hence we perceive that the clause which declares the supremacy of the laws of the Union, like the one we have just before considered, only declares a truth, which flows immediately and necessarily from the institution of a Federal Government. It will not, I presume, have escaped observation that it 'expressly' confines this supremacy to laws

made 'pursuant to the Constitution'; which I mention merely as an instance of caution in the Convention; since that limitation would have been to be understood though it had not been expressed." (The Federalist No. 33, Id., p. 207).

It will not be without difficulty that a determination be made as to the relative jurisdictions of the various courts as Hamilton recognized when he stated:

> "Experience has instructed us that no skill in the science of Government has yet been able to discriminate and define, with sufficient certainty, its three great provinces, the Legislative, Executive and Judiciary; or even the privileges and powers of the different Legislative branches. Questions daily occur in the course of practice, which prove the obscurity which reigns in these subjects, and which puzzle the greatest adepts in political science. The experience of ages, with the continued and combined labors of the most enlightened Legislators and jurists, have been equally unsuccessful in delineating the several objects and limits of different codes of laws and different tribunals of justice. The precise extent of the common law, the statute law, the maritime law, the ecclesiastical law, the law of corporations and other local laws and customs, remain still to be clearly and finally established

> in Great-Britain, where accuracy in such subjects has been more industriously pursued than in any other part of the world. The jurisdiction of her several courts, general and local, of law, of equity, of admiralty, &c. is not less a source of frequent and intricate discussions, sufficiently denoting the indeterminate limits by which they are respectively circumscribed" (The Federalist No. 37, Id., pp. 235-236).

Hamilton clearly pointed out to the people of the State of New York the powers that were to be delegated by virtue of the Constitution to the federal government:

> "The powers delegated by the proposed Constitution to the Federal Government, are few and defined. Those which are to remain in the State Governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negociation, and foreign commerce; with which last the power of taxation will for the most part be connected. The powers reserved to the several States will extend to all the objects, which, in the ordinary course of affairs, concern the lives, liberties and properties of the people; and the internal order, improvement, and prosperity of the State" (The Federalist No. 45, Id., p. 313).

It is interesting to note that Hamilton believed that the judiciary would be the

weakest of the parts of government and certainly would not by virtue of a doctrine called "pendent jurisdiction" be able to overrule the ability of the Legislative Branch of government to govern.

> "Whoever attentively considers the different departments of power must perceive, that in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the constitution; because it will be least in a capacity to annoy or injure them. The executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary on the contrary has no influence over either the sword or the purse, no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither Force nor Will, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments" (The Federalist No. 78, Id., pp. 522-523).

When Hamilton discussed the determinations to be made by the United States Supreme Court relative to cases which arose under the constitution or laws of the United States, he stated:

"The arguments or rather suggestions, upon which this charge is founded, are to this effect: 'The authority of the proposed supreme court of the United States, which is to be a separate and independent body, will be superior to that of the legislature. The power of construing the laws, according to the spirit of the constitution will enable that court to mould them into whatever shape it may think proper; especially as its decisions will not be in any manner subject to the revision or correction of the legislative body. This is as unprecedented as it is dangerous. In Britain, the judicial power in the last resort, resides in the house of lords, which is a branch of the legislature; and this part of the British government has been imitated in the state constitutions in general. The parliament of Great-Britain, and the legislatures of the several states, can at any time rectify by law, the exceptionable decisions of their respective courts. But the errors and usurpations of the supreme court of the United States will be uncontrolable and remediless.' This, upon examination, will be found to be altogether made up of false reasoning upon misconceived fact" (The Federalist No. 81, Id., pp. 542-543).

Hamilton apparently did not recognize that the judiciary even though powerless to act without the assistance of the execu-

tive could establish "causes of action" entirely upon their own which would cause their case law to be effectively considered by the citizens of the United States.

> "It may in the last place be observed that the supposed danger of judiciary encroachments on the legislative authority, which has been upon many occasions reiterated, is in reality a phantom. Particular misconstructions and contraventions of the will of the legislature may now and then happen; but they can never be so extensive as to amount to an inconvenience, or in any sensible degree to affect the order of the political system. This may be inferred with certainty from the general nature of the judicial power; from the manner in which it is exercised; from its comparative weakness, and from its total incapacity to support its usurpations by force. And the inference is greatly fortified by the consideration of the important constitutional check, which the power of instituting impeachments, in one part of the legislative body, and of determining upon them in the other, would give to that body upon members of the judicial department. This is alone a complete security. There never can be danger that the judges, by a series of deliberate usurpations on the authority of the legislature, would hazard the united resentment of the body

> entrusted with it, while this body was possessed of the means of punishing their presumption by degrading them from their stations" (The Federalist No. 81 Id., pp. 545-546).

The specific reservation and limitation upon the authority of the judiciary was set out in Federalist Paper No. 83:

> "In like manner, the judicial authority of the federal judicatures, is declared by the constitution to comprehend certain cases particularly specified. The expression of those cases marks the precise limits beyond which the federal courts cannot extend their jurisdiction; because the objects of their cognizance being enumerated, the specifications would be nugatory if it did not exclude all ideas of more entensive authority" (The Federalist No. 83, Id., p. 560).

It is respectfully submitted by the respondent in this case that the doctrine of pendent jurisdiction established by the court has in effect extended beyond the meaning and purpose of the Constitution and the spirit thereof the authority of the federal judiciary.

Hamilton proposed that the Bill of Rights which were being requested by certain states prior to the time that they would consider adoption of the United States Constitution was unnecessary and, in fact, dangerous when he stated:

> "I go further, and affirm that bills of rights, in the sense and in the extent in which they are contended for, are not only unnecessary in the proposed constitution, but would even be dangerous. They would contain various exceptions to powers which are not granted; and on this very account, would afford a colourable pretext to claim more than were granted. For why declare that things shall not be done which there is no power to do? Why for instance, should it be said, that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed? I will not contend that such a provision would confer a regulating power; but it is evident that it would furnish, to men disposed to usurp, a plausible pretence for claiming that power. They might urge with a semblance of reason, that the constitution ought not to be charged with the absurdity of providing against the abuse of an authority, which was not given, and that provision against restraining the liberty of the press afforded a clear implication, that a power to prescribe proper regulations concerning it, was intended to be vested in the national government" (The Federalist No. 84, Id., p. 579).

Hence, respondent contends that the Constitution could not have been read to establish pendent jurisdiction over state claims in order to invest the federal judiciary with such power.

II

THERE IS NEITHER JUSTIFICATION NOR REASON FOR A FEDERAL DISTRICT COURT TO HAVE THE POWER ON THE BASIS OF PENDENT JURISDICTION TO DETERMINE STATE CLAIMS PRIOR TO THE TIME THAT THOSE DETERMINATIONS HAVE BEEN MADE IN A STATE COURT, AS A RESULT OF THE CONSTITUTIONAL PROHIBITIONS AND SENSIBLE DOCTRINE OF COMITY.

The respondent would contend that the petitioner has misread the case of United Mine Workers v. Gibbs, 383 U.S. 715, 16 L.Ed.2d 218, 86 S.Ct. 1130 (1966). In the Gibbs case, supra, the Court stated at 383 U.S. 721, 16 L.Ed.2d 225:

> "'. . . State jurisdiction has prevailed in these situations because the compelling state interest, in the scheme of our federalism, in the maintenance of domestic peace is not overridden in the absence of clearly expressed congressional direction.' San Diego Building Trades Council v. Garmon, 359 U.S. 236, 247, 3 L.Ed.2d 775, 784, 79 S.Ct. 773."

It was also stated that:

> ". . . Pendent jurisdiction, in the sense of judicial power, exists when ever there is a claim 'arising under [the] Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . ,' US Const, Art III, §2, and the relationship

> between that claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional 'case.'[12] The federal claim must have substance sufficient to confer subject matter jurisdiction on the court. . . ." 383 U.S. 725, 16 L.Ed.2d 227.

In determining that the power existent in the Federal courts under the doctrine of pendent jurisdiction was merely discretionary the Court further stated:

> "That power need not be exercized in every case in which it is found to exist. It has

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12. The question whether joined state and federal claims constitute one "case" for jurisdictional purposes is to be distinguished from the often equally difficult inquiry whether any "case" at all is presented, Gully v. First National Bank, 299 U.S. 109, 81 L.Ed. 70, 57 S.Ct. 96, although the issue whether a claim for relief qualifies as a case "arising under . . . the laws of the United States" and the issue whether federal and state claims constitute one "case" for pendent jurisdiction purposes may often appear together, see Dann v. Studebaker-Packard Corp, 288 F.2d 201, 211-215 (CA 6th Cir 1961); Borak v. J. I. Case Co., 317 F.2d 838, 847-848 (CA 7th Cir 1963), affd on other grounds, 377 U.S. 426, 12 L.Ed.2d 423, 84 S.Ct. 1555.

consistently been recognized that pendent jurisdiction is a doctrine of discretion, not of plaintiff's right.[14] Its justification lies in considerations of judicial economy, convenience and fairness to litigants; if these are not present a federal court should hesitate to exercise jurisdiction over state claims, even though bound to apply state law to them, Erie R. Co. v. Tompkins, 304 US 64, 82 L.Ed. 1188, 58 S Ct 817, 114 ALR 1487. Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law.[15]" 385 US 726, 16 L.Ed.2d 228.

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14. Massachusetts Universalist Convention v. Hildreth & Rogers Co., 183 F.2d 497 (CA 1st Cir 1950); Moynahan v. Pari-Mutuel Employees Guild, 317 F.2d 209, 211-212 (CA 9th Cir 1963); op cit supra, notes 9 and 11.

15. Some have seen this consideration as the principal argument against exercise of pendent jurisdiction. Thus, before Erie, it was remarked that "the limitations [on pendent jurisdiction] are in the wise discretion of the courts to be fixed in individual cases by the exercise of that statesmanship which is required of any arbiter of the relations of states to

Respondent would seriously contend that this Court mistakenly applied the doctrine of pendent jurisdiction for the reasons as set out in the above-quotation. It should be considered that it is not a matter of judicial economy, convenience and fairness to litigants if the defendant, as in this case Spokane County, must be brought into a law suit in Federal District Court rather than having the ability to defend itself on proper state grounds in the state court.

The Court further in the Gibbs case, supra, stated at 383 U.S. 727, 16 L.Ed.2d 228:

> ". . . In the present case, for example, the allowable scope of the state claim implicates the federal doctrine of pre-emption; while this interrelationship does not create statutory federal question jurisdiction, Louisville & N.R. Co. v. Mottley, 211 US

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nation in a federal system." Shulman & Jaegerman, supra, note 9, at 408. In his oftcited concurrence in Strachman v. Palmer, 177 F.3d 427, 431 (CA 1st Cir 1949), Judge Magruder counseled that "[f]ederal courts should not be over-eager to hold on to the determination of issues that might be more appropriately left to settlement in state court litigation," at 433. See also Wechsler, supra, note 9, at 232-233; Note, 74 Harv L Rev 1660, 1661 (1961); Note, supra, note 11, at 1043-1044.

> 149, 53 L.Ed. 126, 29 S Ct 42, its existence is relevant to the exercise of discretion."

It seems odd that the Court would have mentioned that the allowable scope of the state claim implicates the federal doctrine of preemption for if the federal government has preempted the field by legislation it would not seem to be necessary for the doctrine of pendent jurisdiction to exist in order to bring into play any state claim.

Furthermore, the Court specifically emphasized at 383 U.S. 728, 16 L.Ed.2d 229:

> "We are not prepared to say that in the present case the District Court exceeded its discretion in proceeding to judgment on the state claim. . . ."

It is contended that the petitioner has misapplied the Gibbs case, supra, by indicating that it indirectly encouraged the extension of the doctrine of pendent jurisdiction in the Federal courts. Rather, respondent would contend that there was no such encouragement and that, in fact, this Court had not given the same thought to the ramifications as it did later in the case of Moor v. County of Alameda, 411 U.S. 695, 36 L.Ed.2d 596, 93 S.Ct. 1785 (1973).

In Moor, supra, the court stated at 411 U.S. 712, 36 L.Ed.2d 611:

> ". . . But, beyond this, there is a significant difference between Gibbs and these cases. For the exercise of pendent jurisdiction over the claims against the

> County would require us to bring an entirely new party--a new defendant--into each litigation."

The Court continued at 411 U.S. 715, 36 L.Ed.2d 611:

> ". . . At the same time, the County counsels that the Court should not be quick to sweep state law claims against an entirely new party within the jurisdiction of the lower federal courts which are courts of limited jurisdiction--a jurisdiction subject, within the limits of the Constitution, to the will of Congress, not the courts.[33] Whether there exists judicial power to hear the state law claims against the County, is, in short, a subtle and complex question with far-reaching implications."

The reasons then given by the Court for the appropriate refusal to exercise the discretion under pendent jurisdiction are the same as those that warrant the absence of the power to try the issues. Those reasons are stated at 411 U.S. 715, 36 L.Ed.2d 613:

> ". . . First, the District Court pointed out that it 'would be called upon to resolve difficult questions of California law upon

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33. Cf. Shakman, The New Pendent Jurisdiction of the Federal Courts, 20 Stan L. Rev 262, 265-266, 270-271 (1968).

which state court decisions are not legion.'[34] In addition, the court felt that 'with the introduction of a claim against the County under the California Tort Claims Act, with the special defenses available to the County, the case' which will be tried to a jury, 'could become unduly complicated.'[35] As is evident from this Court's decision in Gibbs, 383 US, at 726-727, 16 L.Ed.2d 218, the unsettled nature of state law and the likelihood of jury confusion were entirely appropriate factors for the District Court to consider. And those factors had to be weighed by the District Court against the economy which might be achieved by trying the petitioners' claims against both the police and the County in single proceedings."

As stated in the opinion of the Ninth Circuit Court in this case (App. 29) this Court's opinion in Moor, supra, advised that there are strong arguments in favor of restricting at least certain types of state law actions to available state forums rather than hearing them in federal courts.

Petitioner makes much of the fact that the Ninth Circuit Court of Appeals stands alone in its insistence that the extension

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34. Rundle v. Madigan, 331 F Supp 492, 495 n 5 (ND Cal 1971).

35. Ibid.

of the doctrine of pendent jurisdiction must be by this Court. It would appear that the Ninth Circuit Court of Appeals recognizes it's judicial limitations under the Constitution of the United States and therefore feels that any other appropriate determination must, in fact, be made by this Court. It is respondent's argument herein that the doctrine of pendent jurisdiction not be allowed to give the Federal District Court the power to hear cases which involve state claims. Rather, that the parties, especially the parties defendant, have the ability and the constitutional right to defend a cause of action when brought against them in the proper forum.

Again, the court's decision in the Ninth Circuit Court herein reasons that there are appropriate points against the extension of pendent jurisdiction in a case such as the one at bar. For example, the court opinion recognizes the serious inconvenience to the defendant which has been accomplished by the result of the application of the doctrine of pendent jurisdiction when it is applied to a defendant rather than the allowance of an additional plaintiff to pursue a state claim in federal court (App. 30).

Also, as the court opinion mentions, in most of the diversity cases where joinder of "pendent parties" has been permitted, the courts have been confronted with claims by members of a single family arising out of a single accident. That situation is considerably different from the situation at bar in which the petitioner would have the Court determine that by virtue of the filing of a federal cause of action the petitioner may establish or

gather a state claim into the jurisdiction of the federal courts even though such may be inappropriate.

The petitioner contends that the doctrine of pendent jurisdiction preserves the court's effectiveness and fairness to the parties. However, these reasons do not apply in this particular case. Such a court's "effectiveness" in a system of federalism does damage to Article III, Section 2 of the United States Constitution as limited by the Tenth Amendment thereof. It is also not fair to the defendant because he should have some say with reference to the jurisdiction or what value will a defense be to a defendant?

Petitioner has cited, in giving the history of pendent jurisdiction, the fact that Congress enacted the Judiciary Code which gave the federal courts exclusive jurisdiction over patent, copyright, and trademark actions. Petitioner cites 28 U.S.C. § 1338(b) and argues that its clause concerning "any civil action asserting a claim of unfair competition when joined with a substantial and related claim" is intended to extend the doctrine of pendent jurisdiction. However, it would seem that this action by Congress was a preemption of that particular field and hence it is unnecessary to discuss pendent jurisdiction with reference thereto. This is not so in a federal civil rights case; otherwise, the cases of this Court would not have limited it's application to "persons".

It is also interesting to note that if Congress would attempt to extend the Civil Rights Act by legislation into the states it could be questioned before this Court

as an unconstitutional act of Congress by virtue of the Tenth Amendment of the United States Constitution. Therefore, it seems inappropriate that what Congress may not do by legislative act, this Court may do by the inadvertent extension of pendent jurisdiction.

At a time when the federal courts are inundated with cases which should not be in the federal system, it would appear that the doctrine of pendent jurisdiction will not result in judicial economy, but rather in the proliferation of federal lawsuits by plaintiffs in order to avoid having to select the state forum for the trial of state claims. Saying it another way, it will no longer be necessary for the plaintiff to "carefully choose his forum." He will need only to find a federal remedy and then attempt to establish a state claim which can be tried within that federal remedy by virtue of pendent jurisdiction, if that doctrine is extended as the petitioner requests of this Court in this case.

The inappropriate application of pendent jurisdiction and the federal civil rules are not consistent with the United States Constitution and should be overruled so that the federal system will once again exist as was explained to the people of the State of New York by Alexander Hamilton. Cases will then be decided in the federal court system "under the laws of the United States," Article III, Section 2, and in the state courts under the laws of the states as "reserved to the states," Tenth Amendment, with a review thereafter in the federal court if appropriate.

In his conclusion, petitioner contends that there is no obstacle to the filing and

prosecuting of a claim against the county by virtue of RCW 4.96.010 and RCW 4.08.120. However, it was deemed to be an obstacle of such substantial proportions that the petitioner was compelled to request in the complaint that a three-judge panel be constituted under 28 U.S.C.A. § 2281 in order to make such a determination.

The argument of petitioner misses the point that the purpose of the federal Civil Rights Act is to make "persons" primarily liable for their actions and not have secondary liability avoid that purpose. The determination of secondary liability, or here the liability of the County, should be made separately in state court, not determined at the same time by the federal court because of the application of pendent jurisdiction. Otherwise, Moor v. County of Alameda, supra, and City of Kenosha v. Bruno, 412 U.S. 507, 37 L.Ed.2d 109, 93 S.Ct. 2222 (1973), will be overruled sub silentio.

In addition, the ramifications of the extension requested in the case at bar should be considered with the case of Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 29 L.Ed.2d 619, 91 S.Ct. 1999 (1971), in mind. What state claim will not be subject to creation so that it can be joined with some federal "case as a whole" by virtue of pendent jurisdiction to be established in the federal system? This absurd result would be in derogation of plain constitutional principles which should be applied in this case.

The petitioner alleges that the crafty defendant appreciates the opportunity to sit back and watch the case develop and then take advantage of it. Respondent wonders why this is objectionable? Is it because it does not allow a crafty plaintiff to take advantage of a defendant by the use of the doctrine of pendent jurisdiction which is discretionary at best under present holdings?

III

PETITIONER'S COMPLAINT ON ITS FACE FAILED TO ALLEGE A STATE CAUSE OF ACTION OVER WHICH A FEDERAL COURT COULD EXERCISE PENDENT JURISDICTION.

Even assuming the existence of pendent jurisdiction, fatal to petitioner's attempt to invoke the doctrine is her failure to allege anywhere in the complaint a valid, presently existing state cause of action against the respondent Spokane County, upon which the Federal District Court might exercise its power. Pendent jurisdiction simply does not exist in a vacuum. Rather, it is a judicially created doctrine which federal courts have seen fit to invoke when presented with complaints alleging a substantial federal claim, coupled with a cause of action or a "claim" which is brought under state law.

In the instant case, petitioner would have this Court create a state cause of action which petitioner admits in her complaint is presently non-existent under state law. This can be seen from an examination of petitioner's second amended complaint (App. 12-17).

Petitioner specified five causes of action in her second amended complaint,

alleging violations of the First, Ninth and Fourteenth Amendments to the United States Constitution and alleging the unconstitutionality of § 36.16.070 of the Revised Code of Washington (App. 15-16).

Petitioner apparently sought to invoke the doctrine of pendent jurisdiction by two statements in the section of her complaint denominated PARTIES. In paragraph 5 of the second amended complaint, petitioner alleged that the defendant, Howard, was acting as the agent of defendant, Spokane County (App. 13). Finally, in paragraph 6 of the section entitled PARTIES, the petitioner alleged that "defendant Spokane County is a public corporation and an action may be maintained against it authorized by RCW 4.08.120" (App. 14).

Section 4.08.120 of the Revised Code of Washington provides in pertinent part as follows:

> "Actions against public corporations. An action may be maintained against a county . . . either upon a contract made by such county, . . . or for an injury to the rights of the plaintiff arising from some act or omission of such county or other public corporation."

Although appearing nowhere in the pleadings, petitioner mentions in the conclusion of the brief RCW 4.96.010, which provides:

> "Tortious conduct of political subdivisions, municipal corporations and quasi municipal corporations--Liability for damages. All

> political subdivisions, municipal corporations, and quasi municipal corporations of the state, whether acting in a governmental or proprietary capacity, shall be liable for damages arising out of their tortious conduct, or the tortious conduct of their officers, agents or employees to the same extent as if they were a private person or corporation: PROVIDED, That the filing within the time allowed by law of any claim required shall be a condition precedent to maintaining of any action. The laws specifying the content for such claims shall be liberally construed so that substantial compliance therewith will be deemed satisfactory."

However, the petitioner in her complaint specifically alleged that "Plaintiff's dismissal was authorized by § 36.16.070 of the Revised Code of Washington" (App. 12, 14, 15, 16).

Revised Code of Washington § 36.16.070 provides as follows:

> "Deputies and Employees. In all cases where the duties of any county office are greater than can be performed by the person elected to fill it, the officer may employ deputies and other necessary employees with the consent of the Board of County Commissioners. The Board shall fix their compensa-

> tion and shall require what deputy shall give bond and the amount of bond required from each. The sureties on deputies' bonds must be approved by the Board and the premium therefor is a county expense.
>
> A deputy may perform any act which his principal is authorized to perform. The officer appointing a deputy or other employee shall be responsible for the acts of his appointees upon his official bond and may revoke each appointment at pleasure."

Under the cited section of Washington law, any deputy or other employee appointed by the Spokane County Treasurer serves at the pleasure of the Treasurer. Consequently, no state cause of action whatsoever was alleged against the respondent, Spokane County, because of the action by the Spokane County Treasurer according to expressed statutory authorization.

The petitioner appears to be attempting to create a state cause of action by a "boot strap" operation. Petitioner appears to be arguing that if and when the Washington law is changed by a finding of unconstitutionality of RCW 36.16.070, then at that time a cause of action will likewise have been created against the County arising from the agency relationship of the treasurer.

It would appear that petitioner is urging a new concept of pendent jurisdiction indeed when she alleges in one breath the existence of a state statute, to-wit:

RCW 36.16.070, which provides complete authority under state law for the County Treasurer's actions, and in the next breath alleges that "The Federal District Court may exercise Pendant [sic] Jurisdiction over the state law claims against the parties."

Further reason for the inapplicability of the doctrine of pendent jurisdiction to the petitioner's complaint is that the very creation of a "Pendent state law claim" would require the empaneling of a three-judge court. Again, petitioner herself has recognized this express requirement of 28 U.S.C. §2281. In petitioner's prayer for relief, she has asked that a three-judge district court be convened (App. 16). Consequently, it appears clear from the very face of petitioner's complaint that no pendent state claim exists when the complaint alleged in all five of the causes of action that the plaintiff's dismissal was authorized by Washington law (App. 15-16).

Accordingly, the respondent respectfully submits that this particular case is the worst possible vehicle for the expansion of a doctrine with such far reaching implications as that of pendent jurisdiction. On the face of its complaint, petitioner has negated any application of such doctrine in this instance.

CONCLUSION

We contend that the doctrine of pendent jurisdiction has been judicially created and extended as a doctrine in equity for

the plaintiff without recognition of constitutional provisions of limitation and questions of unfairness to the defendant.

Therefore, the decision of the District Court for the Eastern District of Washington and the decision of the Ninth Circuit Court of Appeals should be upheld in this case and the judgment affirmed.

Respectfully submitted,

DONALD C. BROCKETT
GARALD A. GESINGER

Counsel for Respondent